No. 6538

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

TATSUMI MASUDA or Takashi Masuda, or Masuda Tatsumi,

Appellant,

vs.

JOHN D. NAGLE, as Commissioner of Immigration at the Port of San Francisco, California,

Appellee.

APPELLANT'S OPENING BRIEF.

RUSSELL W. CANTRELL,
GUY C. CALDEN,
Flatiron Building, San Francisco,
Attorneys for Appellant.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Table of Authorities Cited

No. 6538

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

TATSUMI MASUDA or Takashi Masuda, or Masuda Tatsumi,
Appellant,

vs.

JOHN D. NAGLE, as Commissioner of Immigration at the Port of San Francisco, California,
Appellee.

APPELLANT'S OPENING BRIEF.

This is an appeal from an order and judgment of the Southern Division of the United States District Court, for the Northern District of California, denying the petition for a writ of habeas corpus, filed herein by the petitioner.

FACTS OF THE CASE.

The facts of the case are quite simple, and are without conflict.

A correct recital of these facts appears in the opinion handed down by the learned Judge of the Court below, from which we quote:

"Petitioner, a subject of Japan, was, on July 13, 1928, admitted to the United States, at the port of San Francisco, under subdivision 2 of Section 3 of the Immigration Act of 1924, as a temporary visitor, for a period not to exceed six months, for the purpose of inspecting a Buddhist Sunday School. The Ko Sho Ji Buddhist Temple in Japan assisted him in obtaining his passport, and upon arrival here he claimed to be a Buddhist preacher, and testified that he contemplated becoming a Buddhist priest. He presented a certificate reading as follows:

> 'Kyoto 7th of April, 1928, Teacher of Buddhist Sunday School Mr. Tatsumi Masuda, age 23 years 4 months, we delegate the above person to the United States of America for the six months in order to inspect our Sunday School for which we hereby certify.'
>
> Signed: Koshi Ji Buddhist Sunday School, Koshi Sect Provost Hasui Aoki.

Almost two months after the expiration of his six months' stay, about March 1, 1929, he became engaged as a bookkeeper by Z. Inouye, a treaty trader in the import and export business. Petitioner claims that he became a manager of this business about May 1, 1929.

On July 18, 1930, petitioner was taken into custody by the Commissioner of Immigration for the reason that he had remained in the United States for a longer period than permitted under the provisions of subdivision 2 of Section 3 of the Immigration Act of 1924. On August 28, 1930, he was granted a hearing to enable him to show cause why he should not be deported. The record

> and findings of this hearing were forwarded to the Secretary of Labor at Washington, D. C., and on November 3, 1930, the Secretary of Labor issued a warrant of deportation, upon the ground that petitioner had remained in this country for a longer time than permitted under the Immigration Act. (Tr. pp. 28-29.)"

The sole ground for denying the petitioner the right to remain in continental United States, during the period that, and only so long as, the petitioner maintained his status as a non-immigrant, under the Immigration Act of 1924, appears in the Warrant of Deportation issued by the Secretary of Labor, under date of November 3rd, 1930, as follows:

> "That the petitioner has remained in the United States for a longer time than permitted under the Immigration Act of 1924, or regulations made thereunder." (Tr. p. 24.)

It is apparent that the important question presented for decision relates to the legality of the act of an alien, regularly admitted into the United States, who, in good faith while domiciled therein, changes his status from "an alien visiting the United States temporarily, as a tourist, or temporarily for business," to the status of "an alien entitled to remain in the United States solely to carry on trade, under and in pursuance of a present existing treaty of commerce and navigation."

If, in making such a change as a non-immigrant, from his status as a temporary visitor, under Section 3, subdivision 2 of the Immigration Act of 1924, to

the temporary status of a treaty trader, under Section 3, subdivision 6 of said Act, the alien violated any law of the United States, then, we concede, the alien, being unlawfully in the United States, is subject to deportation.

If, on the other hand, in making such a change of status as a non-immigrant, the alien violated no law of the United States, then we respectfully submit the alien has a legal right to remain in the United States while this non-immigrant status continues, and, in consequence, the decision of the learned Judge of the Court below, being erroneous, the judgment and order appealed from should be reversed.

We respectfully submit that the instant case involves primarily a construction of the provisions of the Treaty of Commerce and Navigation entered into between this country and the Empire of Japan, on February 21st, 1911, and therefore the case is strictly a treaty case, and the solution of the problem presented for decision necessarily requires the proper interpretation, construction and application of the provisions of said Treaty in connection with the provisions of the Immigration Act of 1924, and the rules and regulations promulgated by the Secretary of Labor, to carry into effect the provisions of this Act.

We concede, if no question of treaty rights was involved, that the period of petitioner's visit in this country having expired, and the consent of our Government to his presence in this country having been withdrawn by the institution of deportation proceed-

ings, petitioner was illegally in the country, and the deportation order was proper.

Metaxis v. Weeden (Rehearing Opinion), 44 Fed. (2nd) 539;

Wong Gar Wah v. Carr, 18 Fed. (2nd) 250;

Ewing Yuen v. Johnson, 299 Fed. 604.

The opinion of the learned judge of the Court below, handed down at the time that the petitioner's petition for the writ was denied, is apparently based upon the proposition that immediately upon the expiration of six months, the period that petitioner was admitted into the United States as a temporary visitor, his further stay in continental United States became *eo instante* unlawful; that, in consequence, the subsequent change in status of the petitioner from that of a temporary visitor, to that of a treaty trader, was in violation of the laws of the United States, subjecting him to deportation.

We appreciate the difficult task presented, of endeavoring to convince this Honorable Court that the opinion of the learned judge of the Court below, for whose learning and ability we have the greatest respect, is erroneous, and, in consequence, that the order and judgment appealed from should be reversed, but we feel confident that in view of the attitude disclosed by this Honorable Court, in its many opinions handed down, bearing upon the liberal interpretation and construction of our immigration laws, and the steadfast endeavor of this Honorable Court to so construe the provisions of the immigration laws of our country as to keep them in harmony with existing treaties, that

this Honorable Court will so construe the applicable provisions of the Immigration Act of 1924, to the instant appeal, with the provisions of the said Treaty, as to continue this harmonious interpretation.

We shall endeavor to show, in this argument, that in denying the petition for the writ, the learned judge of the Court below erred in the particulars, amongst others, indicated by appellant's assignment of errors, appearing on page 35 et seq. of the Transcript of Record filed herein, as follows:

1. "That the Court erred in holding that the petitioner and appellant is not entitled to a treaty trader status, under and by virtue of Section 3, subdivision 6 of the Immigration Act of 1924, and under and by authority of Article 1 of the Treaty of Commerce and Navigation, entered into between the United States of America and the Empire of Japan, on the 21st day of February, 1911, as referred to in said petition.

2. That the Court erred in holding that the petitioner and appellant, the duly appointed agent of a treaty trader, lawfully domiciled and residing within the United States, under and pursuant to the provisions of the Treaty of Commerce and Navigation entered into between the United States, and the Empire of Japan, on the 21st day of February, 1911, was not entitled to remain within the United States during the period that such status continued.

3. That the Court erred in holding that a treaty trader, pursuant to the provisions of Article 1 of the said Treaty, while lawfully domiciled within continental United States, was prohibited, under the laws of the United States, from

employing, as the agent of his choice, the petitioner and appellant, as manager of the business of such treaty trader, conducted and maintained within continental United States.

4. That the Court erred in holding that under and by virtue of the provisions of the Treaty of Commerce and Navigation, entered into between the United States of America, and the Empire of Japan, on the 21st day of February, 1911, and under and by authority of the Immigration Act of 1924, the petitioner and appellant, who was lawfully admitted into the United States, did not have the legal right, pursuant to the laws of the United States, and of the said Treaty, to, in good faith, change his status from that of a temporary visitor, under the provisions of subdivision 2 of Section 3 of the Immigration Act of 1924, to the temporary status of a treaty trader, under and pursuant to the provisions of subdivision 6 of Section 3 of the Immigration Act of 1924, and to continue to lawfully reside within the United States during the period that the petitioner and appellant maintains, and continues to maintain, such temporary status as a treaty trader.

5. That the Court erred in holding that the petitioner and appellant, after lawful admission into the United States, by changing, in good faith, his status from that of a temporary visitor, to that of a treaty trader, violated the laws of the United States, and that, in consequence, the Secretary of Labor had authority, in law, to order the deportation, and deport, petitioner and appellant, because of such change of statuts.

6. That the Court erred in holding that the petitioner and appellant, after lawful admission

into continental United States, by changing, in good faith, his status from that of a temporary visitor, under the provisions of subdivision 2 of Section 3 of the Immigration Act of 1924, to that of a treaty trader, under the provisions of subdivision 6 of Section 3 of said Act, thereby conclusively evidenced his intention of abandoning his status as an alien, entitled to temporarily reside within continental United States, as a non-immigrant, to that of an immigrant for permanent residence within the United States."

ARGUMENT.

As the facts show, the petitioner was admitted into the United States as a non-immigrant, for a period of six months, pursuant to the provisions of subdivision 2 of Section 3 of the Immigration Act of 1924, which reads as follows:

> "Sec. 3. When used in this Act, the term 'immigrant' means any alien departing from any place outside of the United States, destined for the United States, except (2) an alien visiting the United States temporarily as a tourist, or temporarily for business or pleasure,"

and now seeks to remain in the United States, and claims the legal right so to do, by reason of the fact that petitioner has, in good faith, changed his status, as a non-immigrant, from that of a temporary visitor, under subdivision 2 of Section 3 of said Act, to that of a non-immigrant, as a treaty trader, under and pursuant to the provisions of subdivision 6 of Section 3 of said Act, which reads as follows:

> "Section 3. When used in this Act, the term 'immigrant" means any alien departing from any place outside of the United States, destined for the United States, except (6) an alien entitled to enter solely to carry on trade under and in pursuance of the provisions of a present existing Treaty of Commerce and Navigation."

It is conceded that subdivision 6 of Section 3 of the Immigration Act of 1924, "ties in" the Treaty of Commerce and Navigation, entered into between the United States and the Empire of Japan, in 1911, the first article of which reads as follows:

> "The citizens or subjects of each of the High Contracting Parties shall have liberty to enter, travel and *reside* in the territories of the other; to carry on trade, wholesale and retail; to own or lease and occupy houses, manufactories, warehouses and shops; to employ agents of their choice; to lease land for residential and commercial purposes, and generally to do anything incident to or necessary for trade upon the same terms as native citizens or subjects, submitting themselves to the laws and regulations there established.
>
> The citizens or subjects of each of the High Contracting Parties shall receive, in the terrotories of the other, the most constant protection and security for their persons and property, and shall enjoy in this respect the same rights and privileges as are or may be granted to native citizens or subjects, on their submitting themselves to the conditions imposed upon the native citizens or subjects."

If petitioner had entered the United States as a treaty trader, under subdivision 6 of Section 3 of the

Immigration Act of 1924, it must be conceded that the petitioner would have the legal right to reside in the United States, as long as, and only so long as, the petitioner maintained his status as a non-immigrant, to-wit: a treaty trader.

A Japanese entitled to reside in the United States solely to carry on trade, under subdivision 6 of Section 3 of the Immigration Act of 1924, may under the Treaty employ agents of his choice, and generally do anything incident to, or necessary for trade, upon the same terms as a native citizen of the United States.

The employer of the petitioner, Mr. Inouye, concededly a Japanese treaty trader, is entitled, under the Treaty, to employ an agent of his choice, in connection with his business, and in the exercise of this treaty right, this treaty trader did employ the petitioner as Managing Agent of his business, and, in consequence, the petitioner likewise takes on the status of a treaty trader, and the question involved in this appeal is whether the petitioner is entitled to continue to remain in the United States as long, and only so long, as the petitioner maintains this treaty trader status.

The right to enter and reside in the United States, as a non-immigrant, under the Treaty of 1911, is not confined to those engaged in trade. It also includes employees or agents of treaty traders so engaged.

> "The Treaty with Japan, however, has not left the matter in doubt, for it is therein expressly provided that the Japanese subject would have the right 'to employ agents of their choice inci-

> dent to, or necessary for trade' (Article 1, Japanese Treaty of 1911), and that right is evidently vouch-safed with a view to the use of such of his fellow citizens as may be deemed by him to be, and are, in fact, reasonably necessary to carry on his trade or commerce."
>
> *Shizuko Kumanomido v. Nagle,* 40 Fed. (2nd) 42.

As it must be conceded that the appellant would have the right to enter, and to reside, in the United States, as a treaty merchant, had he been so originally admitted under subdivision 6 of Section 3 of the Immigration Act of 1924, does the fact that the appellant originally entered under subdivision 2 of Section 3 of said Act "temporarily for business or pleasure," and agreed to depart from the United States upon the expiration of his temporary visit, justify, or require his deportation, irrespective of the question of his change of status.

We expressly concede, since all of the authorities are unanimous on this point, that if the original entry into the United States, of the appellant, had been wrongful, he could not, by changing his status thereafter, and while wrongfully within the United States, acquire any right to remain within this country.

The entry of the appellant into the United States, however, was lawful, he having been admitted as a non-immigrant, pursuant to the provisions of subdivision 2 of Section 3 of the Immigration Act of 1924. While domiciled within the United States, the appellant, in good faith, changed his status as a non-immigrant from that of a temporary visitor, to that of a treaty trader.

The question therefore arises whether the appellant, after lawful admission into the United States, and while domiciled therein, in changing his status as a non-immigrant, from that of a temporary visitor, under subdivision 2 of Section 3 of the 1924 Act, to that of a treaty trader, under subdivision 6 of Section 3 of said Act, violated any law of the United States.

This is the crux of the entire matter. The only laws which are in any way applicable are the following sections of the Immigration Act of 1924:

"DEPORTATION.

Sec. 14. Any alien, who at any time, after entering the United States, is found to have remained therein for a longer time than permitted under this Act, or regulations made thereunder, shall be taken into custody and deported.

MAINTENANCE OF EXEMPT STATUS.

Sec. 15. The admission to the United States, of an alien excepted from the class of immigrants by clause (2), (3), (4), (5), or (6) of section 3, or declared to be a non-quota immigrant by subdivision (e) of section 4, shall be for such time as may be by regulations prescribed, and under such conditions as may be by regulations prescribed (including, when deemed necessary for the classes mentioned in clause (2), (3), (4) or (6) of section 3, the giving of bond with sufficient surety, in such sum and containing such conditions as may be by regulations prescribed) to insure that, at the expiration of such time or upon failure to maintain the status under which admitted, he will depart from the United States."

The applicable rules and regulations of the Secretary of Labor, promulgated to carry into force and effect, the provisions of the 1924 Immigration Act, are as follows:

> Rule 3. Subdivision H. Par. 1. "In cases where an alien claims to be visiting the United States temporarily as a tourist or temporarily for business or pleasure, if the examining officer is satisfied beyond a doubt of the applicant's status, he may temporarily admit such alien, if otherwise admissible, for a reasonable fixed period, under no circumstances to exceed one year, on condition that such alien shall maintain such status of a non-immigrant during his temporary stay in the United States and voluntarily depart therefrom at the expiration of the time fixed and allowed. * * *."
>
> Rule 3. Subdivision H. Par. 2. "Where the examining officer is in doubt as to the alien's claimed status as a non-immigrant under subdivision 2 of section 3 of the Immigration Act of 1924, such alien shall be held for examination in relation thereto by a board of special inquiry, which board may temporarily admit such alien, if otherwise admissible, for a reasonable fixed period, under no circumstances to exceed one year, on condition that such alien shall maintain such status of non-immigrant during his temporary stay in the United States and voluntarily depart therefrom at the expiration of the time allowed. * * *."
>
> Rule 3. Subdivision H. Par. 3. "Where the examining officer is satisfied beyond a doubt that an alien seeking to enter the United States as a non-immigrant, pursuant to subdivision 6 of sec-

> tion 3 of the Immigration Act of 1924, is entitled to enter solely to carry on trade under and in pursuance of a Treaty of Commerce and Navigation which existed on May 26, 1924, he may admit such alien, if otherwise admissible, on condition that such alien shall maintain such status of a non-immigrant during his stay in the United States, and upon failure or refusal to maintain such status that he will voluntarily depart. * * *"

Appellant was admitted into the United States as a non-immigrant, under subdivision 2 of Section 3 of the 1924 Act, as a temporary visitor, and agreed to depart from the United States, upon the expiration of the period granted. Did Congress, by the enactment of the above quoted sections (Sections 14 and 15) intend to violate the provisions of the Treaty of Commerce and Navigation, entered into between this country and the Empire of Japan, on February 21st, 1911, by declaring that *eo instante,* upon the expiration of the period under which the alien was temporarily admitted into the United States, the alien shall be "deemed to be unlawfully in the United States," thus prohibiting the alien from changing his status to a treaty trader.

There is no such express provision found in either Section 14, or Section 15, of the Immigration Act of 1924, and the question therefore arises whether Congress, in thus enacting the above quoted sections found in the 1924 Immigration Act, had clearly in mind, the construction of said sections which the Secretary of Labor attempts to place upon them, to-wit: that upon the expiration of the temporary period

under which appellant was admitted into the United States, he immediately was "deemed to be in the United States contrary to law," and subject to deportation, and any subsequent change of status from that of a non-immigrant, admitted as a temporary visitor, to that of a non-immigrant, as a treaty trader, was not permissible under any reasonable interpretation, either of the provisions of the 1924 Immigration Act, or of the provisions of the Treaty of Commerce and Navigation, entered into between this country, and the Empire of Japan, in 1911.

It is at this point that we disagree both with the decision of the Secretary of Labor, and with the decision of the learned judge of the Court below.

The correct solution of the question, we respectfully submit, requires not only a liberal construction and application of the provisions of the Immigration Act of 1924, and the applicable rules and regulations promulgated by the Secretary of Labor, but the applicable provisions of the 1911 Treaty must likewise be construed and applied to the facts of this case, since the 1924 Immigration Act itself provides that the term "immigration laws" includes all immigration acts, and all laws, conventions and treaties of the United States relating to the immigration, exclusion or expulsion of aliens. (Sec. 28-G.)

If, in construing the provisions of Sections 14 and 15 of the Immigration Act of 1924, this Honorable Court holds that the general language of the statute in question is broad enough to violate certain provisions of the 1911 Treaty heretofore quoted, and that

Congress had clearly in mind, such a result, when passing the Immigration Act of 1924, then, of course, appellant, upon the expiration of the period of his temporary visit in this country, was unlawfully within the United States, and he could not, by thereafter changing his status from a non-immigrant, under subdivision 2 of Section 3 of the 1924 Act, to that of a treaty trader, under subdivision 6 of Section 3 of said Act, acquire any right to remain therein.

We respectfully contend, however, that not only does it not clearly appear that Congress, in passing the Immigration Act of 1924, had in mind any such result, but that, on the contrary, Congress, in so passing said statute, did not intend in anywise to violate in this respect any of the provisions of the Treaty of 1911.

What great object did Congress have in mind when it passed the Immigration Act of 1924?

From a perusal of the 1924 Immigration Act, it is apparent that this Act classifies aliens seeking admission into and residence within the United States, into two general groups: (a) immigrants who are seeking admission as permanent residents, and (b) non-immigrants, who have only a temporary status, or a right to remain, dependent and contingent upon the conditions of admission.

The whole purpose and intent of the 1924 Act is to permanently maintain the respective status of aliens so admitted into the United States; the law being clear that under no circumstance can an alien admitted as a temporary visitor, thereafter, while resid-

ing here, change his status to that of a permanent resident.

The maintenance of this status, whether of permanent or temporary residence, is determined, under the 1924 Act, by the character of the visa issued to each alien by the respective consular agent, and the production of which, at the port of entry, is a condition precedent to the right of entry of an alien into this country.

Immigration visaes are issued to those aliens who, with but minor exceptions, are seeking admission into the United States for permanent residence, while passport visaes are issued to those aliens who are seeking admission under a temporary status.

Analyzing the provisions of the 1924 Immigration Act, exclusively from the standpoint of an alien Japanese, it is expressly declared that no such alien, being ineligible to citizenship, is admissible, save and except as he qualifies as a non-immigrant, pursuant to the provisions of Section 3, or as a non-quota immigrant, pursuant to the provisions of Section 4.

We expressly concede that no alien Japanese, entering the United States under a passport visa, pursuant to the provisions of Section 3, can, after his entry into the United States, change his status from that of a temporary visitor, to that of a permanent resident.

Both the letter and the spirit of the Act of 1924 so declares, and there can therefore be no controversy on that point.

Section 15 of the Act declares that any alien Japanese, admitted under the provisions of Section 3,

must, while lawfully residing in the United States, maintain the temporary status under which he was admitted, that is: as a non-immigrant, and Section 14 declares that any Japanese alien, who, at any time after so entering, under the provisions of Section 3 of said Act, remains in this country for a longer time than permitted, as such temporary visitor or non-immigrant, is subject to deportation by the affirmative act of the Secretary of Labor.

It is clear that the intent expressed in, and the object to be accomplished by, the provisions of, Sections 14 and 15 of the 1924 Immigration Act, is to prevent a Japanese alien, who has been admitted as a non-immigrant under a temporary status, to thereafter abandon such temporary status in an endeavor to acquire a permanent status, so that he may permanently reside within the United States, irrespective of the conditions under which he was originally admitted.

The pertinent rules and regulations issued by the Secretary of Labor, to carry into effect the provisions of the 1924 Act, are found in Immigration Rule 3, subdivision (h), paragraphs 1 and 3, heretofore quoted.

These rules are entitled to serious consideration as an interpretation of the provisions of the 1911 Treaty, by the Executive Department of our Government.

Paragraph 1 of said rule provides that when an alien seeks admission into the United States as a 3 (2), if the examining officer is satisfied beyond a doubt, of the applicant's status, he may temporarily

admit such alien "on condition that such alien shall maintain such status of a non-immigrant during his temporary stay in the United States"; while paragraph 3 provides that where a Japanese alien is seeking admission into the United States, as a 3 (6), or treaty trader, he will be admitted with the approval of the Examining Officer "on condition that such alien shall maintain such status of a non-immigrant during his stay in the United States."

It is apparent that under these rules a wide discretion is vested in the Immigration authorities at the time the alien seeks admission, pursuant to the provisions of Section 3, and if the authorities are not satisfied of the good faith of the applicant, admission will be denied, or admission may be granted upon the filing of a bond.

Nowhere in these immigration rules, or, in fact, in the 1924 Act itself, is there found any express provision to the effect that an alien admitted under subdivision 2 of Section 3 of the 1924 Act, who overstays his leave, *ipso facto,* "is deemed to be unlawfully in the United States."

Under Section 3 of the 1917 Immigration Act it is expressly provided that any alien from the barred zone, who is conditionally admitted, and who thereafter fails to maintain, in the United States, a status or occupation placing him within the excepted class "shall be deemed to be in the United States contrary to law," and shall be deported; while in Section 34 of said Act, it is likewise expressly provided that any alien seaman who shall land in a port of the United States, contrary to the provisions of the 1917 Act,

shall likewise "be deemed to be unlawfully in the United States."

Immigration rule 6, subdivision a, paragraph 5, likewise recites that any alien admitted into the United States as a 3 (3), and who overstays his leave, "shall be deemed to be unlawfully within the United States," and shall be deported; while in rule 7, subdivision i, paragraph 1, it is expressly provided that if a seaman overstays his leave of sixty days, he "shall be deemed to have abandoned his status as a non-immigrant," and may be deported; while in Immigration rule 10, subdivision d, paragraph 1, it is likewise provided that a student, admitted under Section 4 (e), who fails to maintain his temporary status, "shall be deemed to have abandoned his status as an immigration student," and shall be deported.

If Congress had intended, by the provisions of Section 14 of the 1924 Immigration Act, to make that section applicable to a case where a non-immigrant, lawfully admitted under one classification of Section 3 of said Act, and while domiciled within the United States, changed his status to another classification, as a non-immigrant, under said Section 3, Congress could have clearly expressed its intention by adding to this Section: "is deemed to be unlawfully in the United States."

The Secretary of Labor attempted to place such a construction upon Section 14 of the Act, so that instead of reading as it does, the Secretary of Labor reads into said section, the hereinbefore quoted sentence so as to make the section read as follows:

> "Section 14. Any alien, who, at any time after entering the United States, is found to have remained therein for a longer time than permitted under this Act, or regulations made thereunder, shall be deemed to be unlawfully in the United States."

We respectfully submit that Congress had no such intention in mind at the time that the 1924 Immigration Act was enacted; the sole purpose of the enactment of Section 14 being to prevent the abandonment, by a non-immigrant, from his temporary status, as a non-immigrant, under which he was admitted, to that of a permanent resident.

Such an interpretation, we respectfully submit, will render said section in harmony with the provisions of the existing 1911 Treaty between this country and the Empire of Japan.

We are happy to say that in the case of *Dang Foo v. Day,* 50 Fed. (2d) 116, the Circuit Court of Appeals, for the Second Circuit, has construed Sections 14 and 15 of the 1924 Immigration Act, in consonance with our view on this subject, as hereinbefore expressed.

We quote from page 119 of said opinion:

> "There was nothing to forbid his changing his status to that of a merchant. Non-immigrants, by the plain language of the statute, are entirely outside the general purposes of the law establishing quotas for immigrants, and there was nothing to forbid a member of any one of the six non-immigrant classes to become a member of any other one of such six classes. He came as a traveler or

visitor, which kept him out of the general purposes and scope of the quota law, and, after being admitted as a traveler, he became a merchant, and in doing this remained as a non-immigrant, and was still without the scope of the quota law. Under these circumstances, a bond should not have been required as long as he remained here and was not otherwise deported. This construction will keep the provisions of the 1924 act in harmony with the treaty.

Section 15 of the Immigration Act (8 USCA Sec. 215), permitting a bond to be exacted in cases of temporary visitors to insure their return at the expiration of the temporary period of admission or upon failure to maintain the status under which admitted, has no application to this appellant. The bond, now statutorily provided, has for its purpose insuring that a person, admitted as a non-immigrant (classes of which are described in section 3 of the 1924 act), shall maintain his status here as a non-immigrant, and obviously, so long as he does maintain that status and does not, by the adoption of an inhibited occupation or otherwise, become an immigrant, there can be no reason for requiring him to leave the country, for he is here under those circumstances not in excess of any quota allotted to any country by the statute or otherwise in derogation of any substantial purpose of the Legislature. This is not in conflict with the Chinese treaty. A Chinese or other alien who might enter as a temporary visitor, and who has no intention of becoming, while here, a member of any one of the six classes of non-immigrants entitled to remain longer, can be required to give a bond for his departure after

> completing a reasonable visit, if any reasonable doubt existed as to the bona fides of his express intention; while the alien who came as a temporary visitor and who expressed the intention to shift or later shifted into one of the other exempt classes, as, by becoming a merchant, would be allowed to remain as long as he maintained his exempt status as a non-immigrant treaty merchant. Thus the treaty would be effective and the 1924 Immigration Law applied to its fullest extent, accomplishing its purposes. * * * ''

If our contention that Congress, in passing Sections 14 and 15 of the 1924 Immigration Act, did not intend, or clearly say, that a non-immigrant, lawfully admitted into the United States, under Section 3 of said Act, and while domiciled therein, could not change his status, from one classification to another, under said Section 3 of said Act, but that the sole purpose of the passage of said sections of said Act was to prevent the abandonment, by a non-immigrant, of his temporary status, in an endeavor to acquire a permanent residence, is sound, then we respectfully submit that the case of *Metaxis v. Weeden,* 5459, decided by this Honorable Court on May 26th, 1930, is ''on all fours'' with the case at bar, and should be held to be a pertinent precedent in reaching a proper conclusion in the instant appeal.

The original opinion, in the *Metaxis* case, supra, was based upon the Treaty between this country and Greece, and it was because of the fact that Metaxis was entitled to a treaty trader status, under this Treaty, that the order of deportation was reversed.

Upon rehearing, it being ascertained that this Treaty between the United States and Greece had been abrogated in 1921, no treaty rights being therefore involved in the *Metaxis* case, the order of deportation was affirmed.

Since, in the case at bar, treaty rights are involved, we respectfully submit that the original opinion handed down in the *Metaxis* case, supra, is directly in point with the facts of the instant appeal.

The Secretary of Labor, by his decision rendered in the instant appeal, held that petitioner's stay in the United States, after the six month period had expired, became *eo instante* unlawful, the reason apparently being that immediately upon the expiration of said temporary visit, as a non-immigrant, the petitioner conclusively evidenced his intention of abandonment of his status, as a non-immigrant, by remaining in the United States, during the hiatus after the period of his temporary status had expired, and prior to his acquisition of the status of a non-immigrant as a treaty trader.

This contention is based upon the assumption that petitioner, in overstaying his leave, did abandon his exempt status as a non-immigrant, and, in consequence, the provisions of Sections 14 and 15 of the 1924 Act became immediately applicable.

The best answer to this contention is that the petitioner did not abandon his exempt status, as a non-immigrant, but simply changed his classification as to his exempt status, from a 3(2) to a 3(6).

If the reason of the Secretary of Labor, that the residence of the petitioner in the United States, the moment after the period of his temporary admission had expired, thereupon became unlawful, is sound, then the same argument would apply to an alien who is admitted as a 3(6), and while lawfully residing in the United States abandons one line of business endeavor to engage in another. During a fraction of time this 3(6) alien would not be connected with any business endeavor in this country and, according to the contention of the Secretary of Labor, during this brief period, ipso facto, this 3(6) alien would be unlawfully in the United States, and subject to deportation, even though the best evidence that he did not intend to abandon his temporary status was the fact that immediately after severing his old business relationship, he assumed the new business connection. We respectfully submit that such an interpretation would be entirely out of harmony with the provisions of the 1911 Treaty existing between this country and the United States.

The learned judge of the Court below, in its opinion, attempts to differentiate the facts of the original opinion handed down in the *Metaxis* case, supra, from the case at bar, because of the fact that Metaxis, *immediately* upon his entry into the United States, as a 3(2), entered into partnership with his brother in the mercantile business, whereas in the case at bar, the petitioner did not change his status from a 3(2) to a 3(6) until after the expiration of the six month period.

We respectfully submit that the question of the time of the change of status is a false quantity, the real point for decision being whether or not a non-immigrant, lawfully admitted into the United States can, during his residence therein, lawfully change his status as such non-immigrant, from one classification to another, under Section 3 of the 1924 Act. If anything, the *Metaxis* case, on this particular point, is weaker than the case at bar, since the fact that Metaxis immediately upon his entry into this country, as a 3(2), changed his status to a 3(6), thereby evidenced a possible fraudulent intention in seeking entry into this country.

The opinion handed down by the learned judge of the Court below, bases its conclusion that petitioner, *eo instante,* upon the expiration of the six month temporary period, was, and continued to be, unlawfully within the United States, upon the premise that no right to continued residence within the United States can arise from a mercantile occupation, or status entered into during unlawful residence in continental United States, and cites in support of its premise, various authorities.

We respectfully submit that an analysis of the cited authorities does not support the premise upon which the said conclusion is based; on the contrary, an analysis of these various authorities will show that the true rule laid down in these authorities is that no right to continued residence within continental United States can arise from a mercantile occupation or status entered into during residence in continental

United States, based upon an original unlawful entry into our country.

The opinion cites the *Sugimoto* case, the *Wong Gar Wah* case, the *Wong Mon Lun* case, the *Wong Fat Shuen* case, the *Ewing Yuen* case, and *In Re Low Yin* in support of the premise that the petitioner was unlawfully in the United States at the time that petitioner changed his status from that of a temporary visitor to that of a treaty trader.

We respectfully submit that an analysis of these various citations conclusively demonstrates that not one of them is applicable to the facts of the instant appeal.

The principle laid down in the *Sugimoto* case is that an ineligible alien who unlawfully enters continental United States cannot, by changing his status from that of a laborer, to that of a merchant, acquire any re-entry rights under the 1924 Immigration Act.

In the case of *Wong Gar Wah* no question of change of status was involved. The Court laid down the broad general principle that where the law makes the recitals in certificate No. 6, as the sole evidence of the right of an alien to enter and remain in the United States, the Courts are bound by the recitals in such a certificate.

In the *Wong Mon Lun* case the facts show that the applicant originally entered the United States on September 11th, 1923, and was admitted as a Chinese merchant in possession of a No. 6 certificate. The applicant remained in San Francisco, as a merchant,

until his return to China in 1927, and sought to re-enter in April of 1928 under a re-entry permit.

The alien was ordered deported on the ground that his re-entry was unlawful, since his original entry was fraudulent, and since a re-entry permit can be used only by an alien originally lawfully admitted, the permit having been obtained illegally, it was no basis for a legal re-entry.

In the course of its opinion this Honorable Court says:

> "And we have held that one who enters the United States fraudulently and unlawfully, acquires no right from the occupation in which he afterwards engages during a residence thus unlawfully initiated and maintained."

The *Wong Fat Shuen* case, we respectfully submit, has no bearing on the facts of the instant appeal, since it is simply a reaffirmance of the doctrine enunciated in the *Wong Mon Lun* case, supra, that an alien who surreptitiously and in violation of law, enters our country, cannot, after such entry, acquire an exempt status by engaging in business as a merchant. The same principle is enunciated in the case of "In re Low Yin," being simply a reaffirmance of the rule laid down in the *Wong Mon Lun* case.

The learned Judge of the Court below, we feel certain, was influenced to a great extent, in reaching his decision that the writ should be denied, from the opinion in the *Ewing Yuen* case, since the Court, in its opinion, adopts as its own, a portion of the opinion of the *Ewing Yuen* case.

The facts of the *Ewing Yuen* case are in no wise applicable to the facts of the instant appeal. No treaty rights were involved in the *Ewing Yuen* case, as expressly appears from the opinion. The principle enunciated is simply a forerunner of the rule laid down by this Honorable Court, in the *Wong Gar Wah* case, supra, as well as in the rehearing opinion in the *Metaxis* case, supra.

CONCLUSION.

We have, therefore, this situation:

Petitioner was lawfully admitted into the United States as a non-immigrant, under subdivision 2 of Section 3 of the Immigration Act of 1924, and while domiciled within our country, pursuant to said lawful admission, changes his status as such non-immigrant, from a temporary visitor, to that of a treaty trader.

The petitioner contends that in shifting his status from a temporary visitor, to a treaty trader, he violated no laws of the United States, since he still remains within the exempt class as a non-immigrant, and that as long as petitioner maintains his exempt status of a non-immigrant, no provision of the 1924 Immigration Act demands his deportation.

Petitioner further contends that nothing in the 1924 Immigration Act prohibits an ineligible alien, lawfully admitted into the United States, under Section 3 of said Act, during his residence therein, to change his status from one or the other of the classifications specified in Section 3 of said Act.

Petitioner further contends that such construction should be placed upon the Immigration Act of 1924, since such a construction will preserve the provisions of the 1911 Treaty existing between this country and the Empire of Japan.

That while Congress may abrogate the provisions of an existing treaty, by subsequent legislation on the subject, such intent on the part of Congress to so violate the provisions of such a treaty must clearly appear, and the Courts are not inclined to hold that Congress has so intended to violate the provisions of an existing treaty unless the intent so to do is free from all ambiguity.

In conclusion we respectfully submit that the petitioner, in so changing his status as a non-immigrant, from that of a temporary visitor, under which he was admitted, to that of a treaty trader, having violated no law of the United States, the judgment of the lower Court is erroneous, and should be reversed, and the petitioner permitted to reside within the United States as long as, and only so long as, the petitioner continues to maintain his status as such a non-immigrant.

Dated, San Francisco,
November 7, 1931.

Russell W. Cantrell,
Guy C. Calden,
Attorneys for Appellant.